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HOW SOCIAL MEDIA NETWORKING HAS AN IMPACT ON THE INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

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Abstract

Social media networking sites such as Facebook, Twitter, and LinkedIn have transformed our social lives and direct the way we connect with one another. Whether it is personal or professional use, social media platforms come with many complications. In fact, the use of social media in arbitration is an on-going issue faced by international commercial arbitrators. Nevertheless, so far there has not been a fixed standard to limit the use of social media by legal professionals in arbitration. The only international guidelines that have mentioned the term “social media” are the International Bar Association (or the “IBA”) Guidelines on conflicts of interest in international arbitration and the IBA International Principles on social media conduct for legal profession. However, the references these guidelines make to social media usage are insufficient.

The thesis sets forth to find that social media networking does generate relationships between users, which could cause possible conflicts of interests. This may include arbitrators and parties to a dispute or an arbitrator and the counsel representing the party in the dispute. Such relationships through social media could affect the independence and impartiality of an arbitrator. To achieve this aim, the thesis will analyze relevant rules and case laws regarding the standards of independence and impartiality, and the scope of social media networking standards, to propose a revision to the IBA guidelines for the reference of many arbitral institutions including the Cambodian National Arbitration Centre.

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List of Abbreviations

AAA	American Arbitration Association
Art(s).	Article(s)
Ibid.	The same as previous
Cambodian Arbitration Law	Law on Commercial Arbitration of the Kingdom of Cambodia
CIArb NY	Chartered Institute of Arbitrators New York Branch
Dr.	Doctor
Guidelines on PR	Guidelines on Party Representation in International Arbitration
IBA	International Bar Association
ICC Rules	Arbitration Rules of International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
LCIA	London Court of International Arbitration
NCAC	National Commercial Arbitration Center of Cambodia
The 1985 Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985)
The 2006 Model Law	UNCITRAL Model Law on International Commercial Arbitration (2006)
The 2014 IBA Guidelines	2014 International Bar Association Guidelines on Conflicts of Interest in International Arbitration
UNCITRAL	United Nations Commission on International Trade Law
v.	Versus
Rev. arb.	Revue de l'arbitrage (France)

Chapter I: Introduction

EURL Tecso v. Neoelectra SAS Group in 2014 is one of the first identified cases concerning a challenge based on a social media relationship. In this case, Tecso sought an annulment of an award from the French Courts with one of the claims based on the fact that the President of the Arbitral Tribunal was a Facebook friend of the counsel of Neoelectra Group. In addition, the counsel of Neoelectra "liked" the President of the Tribunal's Facebook page that was created for his Paris Bar election campaign. The Cour d'appel de Paris accepted the challenge. Later on, however, the challenge was denied by the Cour d'appel de Lyon who refused to annul the award. In its reasoning, the Cour d'appel de Lyon stated that the like on the President's Facebook page was immaterial because it occurred after the award was rendered. The Facebook friend issue was not spoken of *per se*.[1] Questions raised in this instance includes whether the court would have set aside the award provided that the mentioned activities took place during or prior to the rendering of the award.

As many could perceive, social media is a new form of technology that is having a major impact upon the lives of individuals and the world at large.[2] To this day, there has not been an exact definition for the term. In a modern-day usage, social media is considered as a digital means of communication acquiring wide-ranging reach and popularity. It comes in all shapes and sizes. Indeed, the forms of social media and its features are constantly evolving.[3] Well-known social media platforms include Facebook, Twitter, LinkedIn, Instagram, and Telegram. According to the Statistics Portal on the Number of Social Media Users Worldwide, the number of social media users doubled (from 1.4 billion to 2.46 billion users) between 2012 and 2017. The number is expected to rise to 3.02 billion users by 2021.[4] In 2017, LinkedIn had 500 million members in more than 200 countries worldwide, operating in 20 different languages.[5] As of the first quarter of 2017, Facebook had 1.94 billion monthly active users globally.[6] Twitter had 328 million

[1] EURL Tesco v. Neoelectra SAS Group, No. 09/28537 (Cour d'appel de Paris March 10, 2011); EURL Tecso v. Neoelectra SAS Group, Publié au bulletin (Cour de cassation, civile, Chambre civile 1 2012); EURL Tecso v. Neoelectra SAS Group, 7 11 mars 2014 (Cour d'appel de Lyon, 2014). EURL Tecso v. Neoelectra SAS Group, Publié au bulletin. EURL Tecso v. Neoelectra SAS Group, 7 11 mars 2014.
[2] Marilyn Bromberg-Krawitz, "Challenges of Social Media for Courts & Tribunals" (The Australasian Institute of Judicial Administration, Inc. and the Judicial Conference of Australia, May 2016), https://aija.org.au/wp-content/uploads/2017/07/Krawitz.pdf.
[3] Comité Interprofessionnel du Vin de Champagne v. Powell, [2015] FCA 1110 330 ALR 67 (Federal Court of Australia 2015).
[4] "Number of Worldwide Social Network Users 2010-2021," Statista, accessed May 17, 2018, https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/.
[5] Barb Darrow, "LinkedIn Claims Half a Billion Users," Fortune, accessed April 21, 2018, http://fortune.com/2017/04/24/linkedin-users/.
[6] "Facebook Users Worldwide 2017," Statista, accessed April 21, 2018, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/.

users in the same year.[7] Therefore, it is logical that arbitrators also have their own accounts on one of the social media or social networks in this sense.

Arbitrators are not public officials to an independent government, because adjudicators or arbitrators in arbitration are commercial men or businesspeople with personal interests and lives, professional associates and own opponents.[8] In fact, the international arbitration community is frequently labeled as a "mafia." According to a leading arbitrator, the community is like a mafia since people appoint one another, and a person always appoints his or her friends, the people whom the individual knows.[9]

In the world of growing trade and legal services where international commercial arbitration functions, many actors know each other in some way.[10] Arbitrators in international dispute are mostly attorneys, big international law firms' partners, and law professors. These players establish a great level of role reversibility: one who sits as arbitrator in a case can be counsel in the next; one who challenges an arbitrator today could be the one being challenged tomorrow. This is not just a theory but is instead a reality. Thus, arbitrators are vulnerable to challenges by a party or counsel of the party when in doubt of their impartiality and independence. The challenge in the case of *ASM Shipping* in 2005 offers a good example.[11] In his submission, counsel for the challenger Michael Beloff QC cited the decision of the Board of the International Council of Arbitration for Sport in *Celtic Plc v. UEFA* in 1998, in which he was disqualified as arbitrator.[12]

In the case of *EURL Tesco v. Neoelectra SAS Group*, Tesco challenged the award before the French Courts based on the ground that arbitrators failed to disclose facts that could lead to doubts of the arbitrators' independence and impartiality. A French Avocat, Romain Dupeyre, posited that the decision rendered by the Cour d'appel de Paris did recommend that the President of the Tribunal and the counsel's Facebook friendship could have raised justifiable doubts on the President's independence and impartiality if the relationship happened prior to the rendering of the award, or if the relationship did not take place from specific circumstances, such as the Paris

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[7] "Twitter: number of active users 2010-2017," Statista, accessed July 19, 2017, https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/.

[8] Sam Luttrel, *Bias Challenges in International Commercial Arbitration: The Need for a "real Danger" Test*, vol. 20 (Kluwer Law International, 2009), p. 2.

[9] Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996), p. 50.

[10] Ahmed S. El Kosheri and Karim Y. Youssef, "The Independence of International Arbitrators: An Arbitrator's Perspective," *ICC Intl. Court of Arb. Bull., ICC Pub. 690 (2008)*, no. Special Supplement 2007 (2007), https://works.bepress.com/karim_youssef/7/, p. 48.

[11] Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (Kluwer Law International, 2009), http://www.kluwerarbitration.com/CommonUI/book-toc.aspx?book=TOC_Luttrell_2009, p. 2.

[12] Arbitration CAS 98/201 Celtic Plc/Union of European Football Associations (UEFA) (Court of Arbitration for Sport October 2, 1998). Mr Beloff appeared as counsel for the Applicant in the challenge proceedings in ASM Shipping Ltd of India v. TTMI of England, 5 [2005] ArbLR (Commercial Court 2005).

Bar election.[13]

Nevertheless, the French courts did not further discuss the issue associated with being a "friend" on Facebook. Hence, it remains unclear whether French laws would require a disclosure of social media relationships. The French court made the decision to refuse the challenge because a Facebook like does not constitute justifiable doubts according to sections 4.3.1 and 4.4.4 of the 2014 Guidelines of the International Bar Association ("IBA") on Conflicts of Interest in International Arbitration (the "2014 IBA guidelines") regarding the Green List application.[14] Another reason is that the court in this case looked into the context (the importance of Paris Bar election page to the arbitrator), and timing of the "like" (after the issuance of the award). The issue then is what happens if the "like" is in a dissimilar context, and the "like" was before or during the arbitral proceeding.

Parties in arbitrations worldwide view the independence and impartiality of their appointed arbitrators as one of the core criteria in obtaining a fair and just outcome for their case. The foundation of arbitrators' power thus derives from the parties either directly or indirectly.[15] Many arbitration laws, including the *Law on Commercial Arbitration of the Kingdom of Cambodia* (the "Cambodian Law on Commercial Arbitration"), provide that upon appointment, an arbitrator shall disclose all circumstances that are likely to raise doubts with regards to his or her independence and impartiality.[16] The law renders parties the power to challenge an arbitrator should there be any situations that could cause justifiable doubts that the arbitrator is dependent or partial.[17] However, the term "justifiable doubts" is vague and can be interpreted differently from jurisdiction to jurisdiction. Further, how to determine whether an arbitrator possesses the independence and impartiality is different under various concepts and interpretations.[18]

Recent developments and the noticeable increase of social media usage have captured many international commercial arbitration practitioners' attention globally.[19] The reason is that social media networking could lead to doubts regarding the independence and impartiality of arbitrators or the arbitration as a whole. Conversely, the Cambodian Law on Commercial Arbitration, the American Arbitration Association (the "AAA") arbitration rules, and even international

[13] Romain Dupeyre, "Arbitrators, Watch Your Facebook Friends!," *YIAG E-Newsletter*, 2012.
[14] The Green List under the guidelines suggests that an arbitrator needs not disclose relationship involving social media between the arbitrator and the counsel or the party to the dispute in arbitration.
[15] Nigel Blackbaby et al., *Redfern and Hunter on International Arbitration-Student Version*, 5th ed. (OUP Oxford, 2009), 5.06.
[16] The Commercial Arbitration Law of the Kingdom of Cambodia NS/RKM/0506/010 ("Cambodian Law on Commercial Arbitration"), (06 March 2006), Art. 20.
[17] Ibid.
[18] UNCITRAL Rules, Art. 15.1. Similar to CIETAC Rules, Art. 29(1).
[19] An initiative of the Legal Projects Team, "The Impact of Online Social Networking on the Legal Profession and Practice" (International Bar Association, February 2012), https://www.ibanet.org/Document/Default.aspx?DocumentUid=17FE9002-CE56-4597-9B9D-FF469F39BEEF.

regulations such as those of the UNCITRAL, the IBA, and the ICC do not regulate any requirements to have arbitrators disclose the virtual relationship they have with the counsel, or one of the parties to a dispute.[20]

IBA Rules and Guidelines are not binding; however, they may serve as a vital source for practitioners and arbitrators.[21] The IBA Guidelines are the result of a compromise among different interests. They answer to an existing demand because they consistently serve as a code of reference by parties to challenges or objections to the appointment of arbitrators. Moreover, even in 2005 *Saipem v. Bangladesh* in ICSID arbitration where the matter concerned a proposal for disqualification of an arbitrator based on his disclosure, the tribunal made a reference to the IBA Guidelines in its decision.[22]

The 2014 IBA guidelines cover many issues related to possible conflicts of interest that might occur prior to, during, or after an arbitration proceeding. The Guidelines employ a broad and objective standard on justifiable doubts to examine whether there are fears as to the arbitrator's ability to be impartial and independent.[23] If there is, it would justify the arbitrator resigning or declining his or her appointment. The said objective standard for disqualification comes along with a different test for disclosure. In that regard, the Guidelines accept the standing of many institutional arbitration rules that disclosure requirements should be seen from the parties' standpoint. They have thereby also embraced the same subjective standard for disclosure as that stipulated in Article 11(2) of the ICC Rules.[24]

The purpose of the 2014 IBA guidelines is to be a practical tool for arbitration users. With that, there are three color-coded lists (red, orange, and green) under the Guidelines, encompassing a number of circumstances where the duty to disclose varies. If a matter falls under the red list, the arbitrator should not consent to the appointment, or resign (but there are exceptions that can be waived by the parties). For instance, if the arbitrator has a significant financial interest in the outcome of the case, the situation will be under the red list. The orange list is a grey area describing the state where an arbitrator may disclose or resign. An example for the orange list is if the same arbitrator has been appointed as arbitrator on two or more occasions by one of the parties, within the past three years. Finally, the green list includes conditions where the disqualification is unfounded and there is no need to disclose. The list also covers situations where an arbitrator has

[20] Cambodian Law on Commercial Arbitration, Arts. 19-21.
[21] "IBA Guidelines," Australian Maritime and Transport Arbitration Commission accessed on August 3, 2017, https://amtac.org.au/iba-guidelines/.
[22] Loretta Malintoppi, "Part III Procedural Issues, Chapter 20 Independence, Impartiality, and Duty of Disclosure of Arbitrators," in *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 1282, http://oxia.ouplaw.com/view/10.1093/law:iic/9780199231386.001.1/law-iic-9780199231386-chapter-20.
[23] IBA guidelines on conflicts of interest in international arbitration ("IBA Guidelines"), (London: International Bar Association, 2014), General Standard 2(a).
[24] ICC Rules, Art. 11(2).

a relationship with one of the parties through a social media network.[25]

This thesis aims to prove that social media networking does generate certain relationships that could cause a conflict of interests between arbitrators and parties to a dispute or counsels representing the party in the dispute. Furthermore, such relationships could impede the appearance of lack of independence and impartiality of the arbitrator. The relationship could additionally lead to *ex parte* communication (any communication between an umpire or juror and a party to a dispute), a prohibited communication between the actors in arbitration.[26]

Since the number of social media users is growing rapidly on a global scale, this thesis proposes that the 2014 IBA guidelines should revise the Green List including the section concerning social media because of its possible impacts on arbitral proceedings and cases. With the increasing number of social networking sites and social media users daily, many people do create professional and personal networks over these platforms. As mentioned, members of social media can include arbitrators, counsels, and parties to a dispute.[27] One possible outcome is that a relationship established through online networking could make an arbitrator appear dependent and partial. A party may also challenge an arbitrator when he or she discovers the online relationship between the other party and the arbitrator. The challenge is permissible under many jurisdictional arbitrations, but there are drawbacks.[28] Processes to challenge an arbitrator can delay arbitral proceedings and the enforcement of an award. The same process has delayed many court proceedings in the United States, New Zealand, and the United Kingdom when dealing with the issue of social media misconduct in court.[29]

This thesis will analyze relevant rules regarding the standards of independence and impartiality, as well as the scope of social media networking standards, to propose a revision of the 2014 IBA guidelines. As noted, there has not been a fixed standard regarding the usage of social media even in Cambodia. Since there has not been an exact regulation in place, and the arbitration community is still looking for a standard, the preference is to look at other advanced institutional rules and

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[25] IBA guidelines on conflicts of interest in international arbitration ("IBA Guidelines"), (London: International Bar Association, 2014), General Standard 2(a), Article 4.3.1 & 4.4.4.
[26] Ave Mince-Didier, "What Is an Ex-Parte Communication?," CriminalDefense Lawyer, accessed April 30, 2018, https://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-defense-case/what-ex-parte-communication.
[27] Jean E. Kalicki, "Social Media and Arbitration Conflicts of Interest: A Challenge for the 21st Century," *Kluwer Arbitration Blog* (blog), April 23, 2012, http://arbitrationblog.kluwerarbitration.com/2012/04/23/social-media-and-arbitration-conflicts-of-interest-a-challenge-for-the-21st-century/.
[28] The IBA Guidelines, the UNCITRAL Arbitration Rules, the UNCITRAL Model Law, and the ICC Rules.
[29] Rachel Dunning, "Dunning, Rachel --- '#Juryduty - Jurors Using Social Media,'" *New Zealand Law Students Journal*, 211, 4, no. 3 (2014), http://www.nzlii.org/cgi-bin/sinodisp/nz/journals/NZLawStuJl/2014/4.html?query=social%20media%20and%20arbitrator; Nicole Black, "Judges, Social Media, and Bad Choices," *Above the Law* (blog), accessed April 21, 2018, https://abovethelaw.com/2017/07/judges-social-media-and-bad-choices/.

regulations. Therefore, this writing will deal with examinations into other international institutional rules such as the IBA Guidelines, the UNCITRAL's, the ICC, and the AAA's. As to the recommendation, the paper will then propose a revision of the 2014 IBA guidelines for the reference of many arbitral institutions including the Cambodian National Arbitration Centre. Methods employed include identifying problems that have arisen and may arise if an arbitrator, while networking, misuses a social media platform in arbitration. To assess potential problems with social media usage, this research examines various court decisions from the US and UK involving this issue. From the study, the author suggests a framework containing five conditions for the arbitral tribunal to consider the applicability of the revision of the guidelines, namely: (1) the importance and consequences, (2) the nature, (3) the scope, (4) the standard, and (5) the parties' interest in social media networking on the independence and impartiality of the arbitrator.

The findings of this research will assist arbitrators in Cambodia when they are appointed or when they deal with problems arising out of the usage of social media networking in arbitration. The entire study of this thesis can also be useful for legal scholars researching on this legal problem in the field of arbitration and litigation.

In summary, this thesis is divided into five chapters. The first chapter deals with the problems existing in the world of arbitration now and presents the purpose of the writing. The second chapter discusses the standard of independence and impartiality of the arbitrator. The third chapter confers about the importance of social media networking on the arbitrator's neutrality, and analyzes the national and international approaches towards the issue of social media usage. The fourth chapter reviews cases concerning the mentioned matter from various jurisdictions, and provide recommendations to the presented issue. Lastly, the fifth chapter offers a conclusion which restates the principle points of the thesis.

Chapter II: The Independence and Impartiality of the Arbitrator

The increasing numbers of online social networking users appear to be an on-going issue encountered by arbitrators in arbitration as judges or arbitrators could also be "friend" on one of the social networking sites with counsels or a party to a dispute. This issue could raise doubts as to the independence and impartiality of arbitrators with also the worries of a potential *ex parte* communication among arbitration actors during the proceeding. In order to better understand the standard of arbitrators' independence and impartiality, this chapter will highlight the problem by explaining what an independent and impartial arbitrator is. Then, the following chapter will deal with the definition of social media, and how it plays a role in the area of international commercial arbitration.

2.1 The Independence and Impartiality of Arbitrators

Theoretically, a distinction exists between "impartiality" and "independence."[30] An arbitrator can be considered partial if he has some relationship with the subject matter in dispute, such as an acknowledged predisposition with regard to the legal issues to be determined. In other words, an arbitrator whose interests agree with a party, or the outcome of a case, is unlikely to be impartial. The independence test can be observed objectively by criteria unrelated to the state of mind. It entails an objective baseline that could curb debate and attempts at self-clarification. The key to questioning the independence rests on whether the arbitrator has an interest in the outcome of the dispute. For example, an arbitrator who has substantial shares of a corporate party traded on the stock exchange would want the party to succeed.[31] Independence implies some prior or current relationship with one of the parties or its legal adviser, either business, professional or social.

The necessity of the independence of all arbitrators prevails in most countries. A basic tenet of the IBA Ethics for International Arbitrators is that there is no difference between standards of behavior expected of party-arbitrators and those of sole or third arbitrators because all are under the same obligation of being impartial and independent.[32]

Examining the basis of courts and arbitrations' requirement to have the one making decisions be impartial and independent, there exists a reference to the term "procedural fairness" or "natural justice" or "due process."[33] The expression of procedural fairness is frequently referred to interchangeably with natural justice. A rejection of natural justice would allow the aggrieved party to challenge the adjudicator or go for legal review of the judgment. Current doctrines of procedural fairness rose out of two aphorisms of law. The first being "no man shall be condemned unheard."[34] The second states "every man has a right to an impartial and independent adjudicator."[35] It is an outcome where no one should be an evaluator in his or her own cause or a more renowned term as *nemo debet esse judex in propria causa*. Following the second would reflect that only individual having no substantial interest in the cause, and no fondness with the parties involved, could be the determiner of it.[36]

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[30] This distinction is well made by Martin Hunter in his article, Martin Hunter, "Ethics of the International Arbitrator," *Arbitration* 53, no. 219 (1987).
[31] Jan Paulsson, "Chapter 5: Ethical Challenges," in *The Idea of Arbitration*, Clarendon Law Series (Oxford, New York: Oxford University Press, 2013), p. 149.
[32] "Introductory Note," *ICSID Review - Foreign Investment Law Journal* 3, no. 1 (March 1, 1988): 159–60, https://doi.org/10.1093/icsidreview/3.1.159, para. 1.
[33] Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test*, p. 1.
[34] Luttrell.
[35] Ibid.
[36] Ibid.

Safeguarding procedural fairness is a key concern in arbitral processes.[37]Based on previous practices in arbitrations, many guileful defendants are not reluctant to exploit the use of the procedural fairness to suspend proceedings and avoid enforcement. Lord Mustill and Stewart Boyd QC as practitioners confirmed in 2001 that the subject of conflict of interest and bias has become more prominent (since 1989) and it has given rise to objections on the ground of the supposed interest or bias (some would never have been put forward in the past).[38]

In connection with how independence and neutrality are regulated in arbitral institutions, many arbitration rules require all arbitrators acting under the Rules to be nonbiased and independent.[39] The provision of the Rules reflects the principal which is fundamental to international arbitration because a failure by an arbitrator to comply with the Rules could constitute a basis for a challenge to an award. In order to ensure neutrality, the Rules require that the prospective arbitrator, before accepting an appointment, discloses any issues that could give rise to justifiable doubts relating to his or her being a partisan or a dependent.

2.1.1 The Characteristics of an Independent and Impartial Arbitrator

"The arbitrator is the *sine qua non* of the arbitral process. The process cannot rise above the quality of the arbitrator."[40] This clause defines the crucial role of arbitrators in all arbitration. To a large degree, the considerations by parties regarding the advantages of going to arbitration rests on the appointed arbitrator.[41] However, due to the diversity of subject matter in potential disputes, it is impossible to find the perfect arbitrator. A universal principle that applies to all arbitrators is that an arbitrator must be independent and impartial.[42]

By definition and as stated, an impartial arbitrator is an individual who is not in favor of a specific party or its case. Instead, an independent arbitrator is a person who does not have intimate relationship with a party or its legal representative either in financial, professional, or individual capacities.[43] However, in truth there is a minimal number of arbitrators who could suppress the

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[37] Ibid.
[38] Sir Michael J. Mustill and Stewart Crauford Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (Butterworths, 2001), 2001, p. 171.
[39] For example, Art. 7 of the AAA-ICDR International Arbitration Rules.
[40] Julian D. M. Lew et al., *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), p. 223.
[41] *See* Dezalay and Garth, *Dealing in Virtue*, p. 8; Pieter Sanders, *Quo Vadis Arbitration?:Sixty Years of Arbitration Practice* (Kluwer Law International, 1999), p. 224.
[42] This universality of the independence and impartiality is in the context of international arbitration. See e.g., Julian DM Lew, Loukas A. Mistelis, and Stefan M. Kröll, Comparative International Commercial Arbitration (Kluwer Law International 2003) 95: The "Magna Carta" of International Commercial Arbitration; Sam Luttrell, Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test (Kluwer Law International 2009) 1–2: Nemo debet esse judex in propria causa, meaning every man has a right to an impartial (and independent) adjudicator.
[43] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed. (Thomson Professional Pub Canada, 1999), at 220-1. *See also* Doak Bishop and Lucy Reed, "Practical

biased and partial emotions experienced as a human being.[44] Any direct relationship between an arbitrator and a party to a dispute would disavow his or her independence. It would also require the arbitrator to withdraw from making any decision over the dispute. Yet, the ideal arbitrator would disclose all situations that "connect" him or her by any means to a party, although this is not categorically obligatory.[45]

2.1.2 Current Legal System Surrounding Independence and Impartiality

The test for bias has seen its variabilities in jurisdictions worldwide. Many arbitral institutions have amalgamated the UNCITRAL Model Law (or the "Model Law") standard of justifiable doubts under Art. 12(2) as a part of the *lex arbitri* of the jurisdiction.[46] For one, Art. 10(3) of the London Court of International Arbitration (the "LCIA") Rules states that an arbitrator could be challenged where "circumstances exist that give rise to justifiable doubts as to his impartiality or independence." Art. 14(1) of the ICDR Arbitration Rules contains the same wording, as do other arbitral rules.[47] Art. 57 of the ICSID Convention stipulates that an arbitrator may be disqualified for fears of having a manifest lack of qualities. This standard of manifest lack calls for a high evidentiary threshold, where challenges can only be carried out on facts rather than inference, and there is "a real risk of lack of impartiality based on those facts." The standard is thus moderately higher than the justifiable doubts test which is based on inferences rather than facts. To put it simply, the standard of manifest lack requires a sort of evident partiality.[48]

2.2 The Standard for the Independence and Impartiality

2.2.1 Arbitrator's Challenge Procedure

The ability to challenge and disqualify an arbitrator is crucial to the integrity of the international arbitral process. In order for the system to operate, it is essential that the parties trust that their dispute is in the hands of a fair arbitral tribunal. Thus, procedures must be in place within

Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration," *Arbitration International* 14, no. 4 (December 1, 1998): 395–430, https://doi.org/10.1093/arbitration/14.4.395.

[44] Gunther J. Horvath, "Chapter 15: The Angelic Arbitrator versus the Rogue Arbitrator: What Should an Arbitrator Strive to Be?," in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer*, 2nd ed. (Kluwer Law International, 2017), p. 1.

[45] Ibid.

[46] Michael Hwang and Lynnette Lee, "Chapter 18: Standard of Proof for Challenge against Arbitrators: Giving Them the Benefit of the Doubt," in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer*, 2nd ed. (Kluwer Law International, 2017), p. 1.

[47] Other arbitral institutions i.e., SCC, SIAC and HKIAC also adopt a similar "justifiable doubts" test.

[48] Hwang and Lee, "Chapter 18: Standard of Proof for Challenge against Arbitrators: Giving Them the Benefit of the Doubt," p. 1.

the arbitral regime to adjudicate whether there is a warranty of disqualification in a particular case.[49]

Although there are no available statistics, challenges to arbitrators have increased noticeably in recent decades.[50] Since the process of disqualification is often hidden in secrecy, it hinders the development of known and consistent standards. The grounds for challenging an arbitrator take various sources. In this matter, for arbitration, as one that is contractual in nature, it examines first at the parties' agreement on any specific provision and then to the arbitration rules. If both are silent, one might then turn to the governing law.[51] Regardless of the source, the conceivable grounds for challenging an arbitrator cover five categories: capacity; special qualifications; nationality; independence (and impartiality); and misconduct. However, this paper only focuses on the criteria of independence and impartiality of arbitrators, where the standard could be a subject of challenge to an arbitrator by a party or counsel to a dispute based on his or her doubts as to the arbitrator's neutrality.

a. Justifiable Doubts

The term "justifiable doubts" exists in the 2014 IBA guidelines to determine whether an arbitrator is impartial and independent. The standard to examine justifiable doubts differs from one jurisdiction to another. The ICC rules in this regard follows the IBA guidelines where the standard of determination is based on the reasonable third person standard.

Standard 2(C) of 2014 IBA Guidelines on Conflict of Interest and the ICC rules look at the standard of justifiable doubts based on the objective test or the apparent bias. The essential dissimilarity between apparent and actual bias is that apparent bias puts emphasis on the appearance of bias rather than whether the bias actually exists. This influences the nature of the test as apparent bias is judged *ex-ante* and actual bias is judged *ex-post*. In other words, independence (apparent bias) is judged prospectively, and impartiality (actual bias) is determined retrospectively. The hypothetical nature of this *ex-ante* test is the source for much difficulty in interpretation.[52]

Many tests for bias are of the reasonable apprehension test, the real possibility test, the real

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[49] W. Michael Tupman, "Challenge and Disqualification of Arbitrators in International Commercial Arbitration," *International & Comparative Law Quarterly* 38, no. 1 (January 1989): 26–52, https://doi.org/10.1093/iclqaj/38.1.26, p.26.

[50] Loretta Malintoppi and Andrea Carlevaris, "Challenges of Arbitrators, Lessons from the ICC," in *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Online Books and Journals, 2015), 140–63, http://booksandjournals.brillonline.com/content/books/b9789004302129_007. p. 141.

[51] Ibid.

[52] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), p. 294.

danger test, and the evident partiality test.[53] In this, some believe that the appropriate standard of proof rests on the likelihood of doubt. It is whether "there may be doubts, there are likely to be doubts, or there would be doubts."[54] Others construe the standard of justifiable doubt as "a real, serious possibility that the arbitrator lacks independence and impartiality." In addition, the standard of proof would require more than a 5%, 10% or 20% chance of bias, in which there is a realistic (or justifiable) possibility that an arbitrator truly lacks impartiality or independence.[55]

On the basis of the argument for the fairly lower standard of realistic possibility, scholars argue that it is to maintain the integrity of the arbitral tribunal and arbitral process. The realistic possibility test focuses on the existence of risks or possibilities of partiality instead of demanding a certainty or probability of partiality.[56] Opponents to this concept study the standard by putting an emphasis on the significance of the efficiency of arbitration. One argument is that by applying the lower standard, it has so far triggered the upsurge of "the Black Art of tactical challenges," a strategy that set out to disqualify or remove arbitrators for trifling interests, associations, and events, and to delay proceedings. For a higher standard, it is found in the real danger test.[57] Other experts are proponents of a threshold in between mere possibility and likelihood.[58] Here, the author believes that the more than 50% probability should then be a fair compromise between terminal ends of the spectrum.[59]

[53] The "reasonable apprehension" test is from the judgment of Lord Hewart CJ in R v. Sussex Justices, Ex p McCarthy [1924] 1 KB 256 (KB); the "real possibility" test is from the decision of the House of Lords in Porter v. Magill [2001] UKHL 67, [2002] 2 AC 357 (HL); The "real danger" test is from Lord Goff of Chieveley, in R v. Gough [1993] AC 646 (HL); The "evident partiality" test is from the United States of America as stated in the Federal Arbitration Act ('FAA') 9 USC §10(a)(2).
[54] Waincymer, *Procedure and Evidence in International Arbitration*, p. 294, 295.
[55] Gary B. Born, *International Commercial Arbitration* (2nd ed. Kluwer Law International 2014) 1779.
[56] Ibid., p. 1778, 1779.
[57] Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test*, p. 278, 279.
[58] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, 2nd ed. (Cambridge University Press, 2012), p. 137.
[59] Hwang and Lee, "Chapter 18: Standard of Proof for Challenge against Arbitrators: Giving Them the Benefit of the Doubt." p. 2, 4.

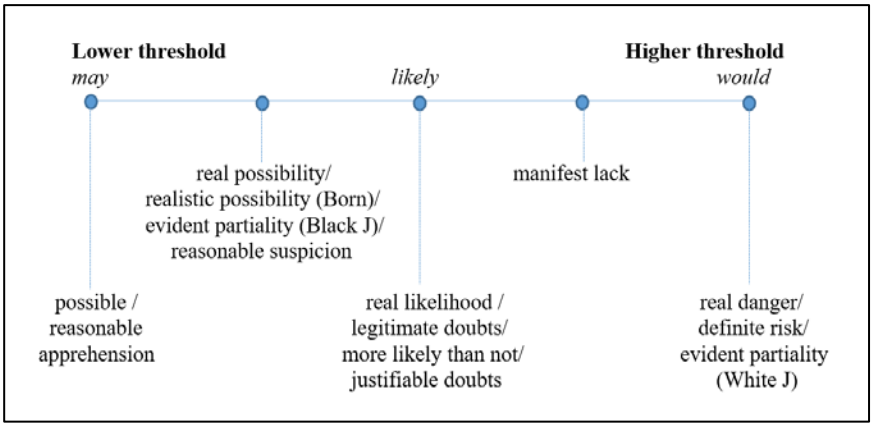

Figure 1. Standard of Proof Spectrum: THE VARIOUS STANDARDS OF PROOF
Source: Hwang and Lee, p. 3.

b. *Ex-Parte* Communication

In relation to the challenge of arbitrators, doubts as to the independence and impartiality of an arbitrator could derive from the worries of possible *ex parte* communication between an arbitrator and counsel or a party to a dispute. Such communication could also be generated from networking among arbitration actors through social media networking sites.

The Latin phrase: "*ex parte*" means "on one side only; by or for one party." An *ex parte* communication comes about when a party to a case, or an individual relating to a party, talks or writes to or otherwise communicates directly with the judge or the umpire regarding the case's matters without the other parties' being aware of it.[60]

An arbitrator who encounters counsel for his or her appointing party at a conference and insouciantly converses on a topic relating to the pending proceedings could be at risk of showing bias in favor of that party. By being involved in *ex parte* communications, the arbitrator breaches his or her confidentiality obligations and may as well imperil the entire arbitral proceeding. Any party-appointed arbitrator that shows his or her partiality to the party that appointed him will lose credibility forever. The validity of the award could also be at risk, and the pool of evidence would risk corruption, which may be irreversible.[61]

Arbitration panels frequently adopt rules concerning *ex parte* communications pertaining to: (1) the period of time within which lawyer can communicate with his or her party's appointed arbitrator; (2) attorney notifying counsel of the opposite side and party arbitrators on contacts with the arbitrator; (3) party umpires informing the other side's arbitrator on communications

[60] Hawai'i State Judiciary, "Judiciary | Why Can't I Talk or Write to the Judge?," Hawai'i State Judiciary, accessed April 23, 2018, http://www.courts.state.hi.us/self-help/exparte/ex_parte_contact.
[61] Horvath, "Chapter 15: The Angelic Arbitrator versus the Rogue Arbitrator: What Should an Arbitrator Strive to Be?," p. 2.

with the adjudicator; and (4) the arbitrator telling both party arbitrators about internal panel talks and both counsels and both party arbitrators about external communications. The consequences of such communications are not well known though there are some recent, well-publicized cases relating to the *ex parte* communications.[62]

There were cases where arbitration award was annulled, and there were cases where arbitrator and counsel got disqualified on the ground of *ex parte* communication. One such case is *Northwestern Nat'l Ins. Co. v. Insco, Ltd* in 2011.[63] In that case, the reinsurer's party arbitrator offered 182 pages of internal panel emails to the reinsurer's counsel. The counsel accepted the emails where the contents include issues still under deliberation by the panel. The Southern District Court of New York found that passing on such documents to counsel violated the ARIAS-US Code of Conduct and Ethical Guidelines, the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes and the New York State Rules of Professional Conduct.[64] The court observed that such disclosures were not justified as an effort to acquire feedback from a party arbitrator nor are they efforts to demonstrate bias of the opposing party arbitrator. The court further held that those exposures tainted the arbitration proceeding which justified disqualification of counsel in further proceedings. The court considered there existed an *ex parte* communication in the case and concluded that in the era where electronic communications play a vital part in arbitrator deliberations, such contacts should be protected just like other forms of personal interactions. Consenting parties to attain panel's confidential deliberations could lead to an unjust gain in the proceedings and affect arbitrators' capability to freely communicate.[65]

An *ex parte* communication in today's world no long covers only social contact and face to face meeting. In this internet age, the communication also includes the telephone communication and any contacts via social media platforms as a part of networking purpose.[66] An ethics principle that might speak to communication via social media is the ban on *ex parte* communications, either between a lawyer and a judge or between a counsel and an arbitrator. Driven by the identical desire to preserve the decision maker's impartiality that animates publicity, the profession has for a long time admonished lawyers not to communicate with judges *ex parte*.[67] This is the same in arbitration as counsels should not contact arbitrators in a manner prohibited by the rules of the

[62] Robert M. Hall, "Commentary: Ex Parte Communications in Arbitration and Their Consequences," Lexis Legal News, December 1, 2016, https://www.lexislegalnews.com/articles/12964/commentary-ex-parte-communications-in-arbitration-and-their-consequences.
[63] Northwestern National Insurance Company v. Insco, Ltd., No. 11 Civ. 1124 (SAS) (United States District Court, S.D. New York November 15, 2011).
[64] Shira A. Scheindlin, Northwestern Nat'l Ins. Co. v. Insco, Ltd., No. 11 Civ. 1124 (United States District Court Southern District of New York November 15, 2011).
[65] Northwestern National Insurance Company v. Insco, Ltd.
[66] Shaziah Singh, "Friend Request Denied: Judicial Ethics and Social Media," *The Internet* 7 (2016): 22.
[67] Rachel C. Lee, "Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era," *Stanford Law Review* 61, no. 6 (2009): 1535–71.

institution to avoid communication in sort of *ex parte*.

Nevertheless, there are situations where *ex parte* communications with arbitrators are suitable. For instance, *ex parte* communication is permissible under arbitration rules for the purpose of scheduling, administration, investigation for suitability or availability of arbitrator, or emergency, which does not address substantive matters of a case.[68] Irrespective of the tactic, in averting any form of inappropriate behavior and sedition, the party should be in the position to notify the other side of any meetings or general briefings. In case there is, meetings should take place at any neutral site.[69]

Born notes that the confidentiality of the arbitral deliberations is fundamental to the adjudicative essence and integrity of the arbitral process. Although rarely addressed in detail in applicable rules or legislation, the duty of confidentiality of the arbitrators' deliberations should be assumed from the award drafting, internal communications regarding disposition of a case or comments on draft awards, and the substance of oral deliberations.[70] Therefore, to avoid breaching the confidentiality duties, arbitrators should be careful to evade any *ex parte* communications with a party, including its counsel, relating to any information discussed during the deliberations.[71]

In short, any *ex parte* communication should terminate instantaneously upon the selection of the presiding arbitrator. Leaking any inner information to the appointing party would considerably misbalance the arbitration, and put in danger the fundamental right of the other party to equal treatment by the arbitral tribunal.[72] *Ex parte* communication could serve as a ground for the challenge to arbitrators in arbitration should there be any improper contacts between an arbitrator and counsel or a party to a dispute.[73]

c. Disclosure Obligations

Facts that could raise doubts as to an arbitrator's impartiality and independence should be disclosed, if for no other reason than to prevent the future award against challenges.[74] In fact, disclosure standard is a sensitive issue as different codes of ethics utilize different formulations.

The duty to disclose normally arises in two stages. First of all, a potential arbitrator has the

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[68] AAA-ICDR Rules, Art. 7(2); The IBA Rules of Ethics, Art. 5(1).
[69] See, on this issue, Carter, "Rights and Obligations of the Arbitrator", Arbitration 170 (1997) 172.
[70] Gary B. Born, *International Commercial Arbitration*, 2nd ed., vol. 3 (Wolters Kluwer, 2014), https://lrus.wolterskluwer.com/store/product/international-commercial-arbitration-second-edition-three-volume-set/9041152199.
[71] Jingzhou Tao, "Chapter 33: Deliberations of Arbitrators," in *Powers And Duties Of An Arbitrator: Liber Amicorum Pierre A. Karrer*, 2nd ed. (Kluwer Law International, 2017), p. 5.
[72] Peter Klaus Berger, "Chapter 2: The In-House Counsel Who Went Astray: Ex-Parte Communications with Party-Appointed Arbitrators," in *Stories from the Hearing Room: Experience from Arbitral Practice. Essays in Honour of Michael E. Schneider* (Kluwer Law International, 2014), supra 67.
[73] Lee, "Ex Parte Blogging."
[74] Paulsson, "Chapter 5: Ethical Challenges," p. 152.

disclosure obligation to the person who approaches him or her for possible appointment. In the second stage, once appointed, the arbitrator has the same duty to disclose to parties and the arbitral tribunal whom the arbitrator has not informed yet.[75] Therefore, the ordinary procedure would be that all parties and the arbitral tribunal would receive the information of the disclosure after the appointment of a party's arbitrator and all parties have to disclose following the appointment of their arbitrator.

Disclosure before and after the arbitrator's appointment assists in the prevention of selecting an arbitrator who could be challenged successfully later and thus thwarts the interruption of arbitral proceedings.[76] The duty to disclose is a continuing duty as the arbitrator has to disclose all circumstances from the time of his or her appointment and throughout the arbitral proceedings.[77] Revealing information that is possible to establish a conflict of interest to all parties is also vital for the grounds of estoppel. The acceptance of an arbitrator holding conditions that could lead to justifiable doubts as to his or her impartiality and independence lays the basis for possible estoppel of the accepting party. The party who agreed to appoint the said arbitrator but later on seek to challenge him or her based on the same events or to challenge the award at the competence court can be estopped from making such challenge.[78] Furthermore, the challenging party, by means of background investigation, could have been aware of or consequently uncover facts as a substance for arbitrator disqualification. Normally the facts unveil as a result of the rules necessitating forthcoming arbitrators to deliver relevant information. Disclosure is imperative as courts in numerous jurisdictions have vacated an award provided that some facts were concealed during the arbitration proceeding.[79]

To sum up, potential arbitrators owe a duty of disclosure to those who have appointed them. Disclosures include circumstances that are likely to give rise to justifiable doubts, albeit those circumstances take place after the arbitrator is primarily approached. Nevertheless, it should be before he or she is appointed or chosen. The duty to disclose does not mean that an arbitrator

[75] P Sanders, "Procedures and Practices under the UNCITRAL Rules," (1979) 27 American J Comparative L453, 458; the UNCITRAL Working Group revised the Rules by adding the words "and the other members of the arbitral tribunal" after the word "parties" in the second sentence of corresponding Art. 9 of the 1976 UNCITRAL Rules to clarify that an arbitrator should disclose to both the parties and the other members of the arbitral tribunal.
[76] David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, Second Edition, Oxford Commentaries on International Law (Oxford, New York: Oxford University Press, 2013), p. 195.
[77] UNCITRAL Arbitration Rules, Art. 11, also as *travaux preparatoires* of the 1976 UNCITRAL Rules. *See Report of the Secetary-General on the Preliminary Draft Set of Arbitration Rules,* UNCITRAL, 8th Session, UN Doc. A/CN.9/97 (1974), reprinted in (1975) VI UNCITRAL Ybk 163, 171.
[78] *See* Art. 12(2) of UNCITRAL Arbitration Rules; The US Supreme Court in setting aside an award because of the appearance of bias stated: "we can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible biased." *Commonwealth Coatings v Continental Casualty*, 393 US 145, 148-9 (1968).
[79] The International and Comparative Law Quarterly, Vol. 38, No. 1 (Jan., 1989), p. 32.

should disclose *all* circumstances. Rather, the disclosure obligation covers only to the extent that the events that would be likely than not to cause ones to be partial or dependent. Nonetheless, the disclosure does not imply the existence of doubts as to an arbitrator being a partisan or a dependence.[80] Disclosure supports a challenge and builds confidence between an arbitrator and the parties.[81]

d. Consequences of Failure of Disclosure

Consequences of failure to disclose possible conflicts of interests range from the risk of having an annulment of the Award to a disqualification of the legal practitioner.[82] In *Milan Presse v. Media Sud Communication* at the Paris Regional Court of Appeal in 1999, an arbitrator to the case did not disclose to the tribunal that he was the party's counsel's father-in-law. In that case, the court set aside the award because the relationship led to a patent conflict of interests in the matter.[83]

There are also cases relating to disqualification of legal practitioners involving connections between the arbitrator's law firm and a party or its counsel. In the case of 1999 *Anders Jilikén v. Ericsson, Hogsta Domstolen*, the Swedish Supreme Court vacated the award as per claimant's request.[84] Claimant in the case claimed that respondent used to hire a law firm where the President of the tribunal has a joint offices with. The president also rendered part-time legal consultation as an outer consultant. The president did not reveal such relation although the situation implied a clear disclosure obligation.[85] The court held that the link which could lead to a critical business bond between law firm and client lessens the trust in the arbitrator's non-biased image particularly when he or she is at the same law office whose client is a party to his or her proceedings.[86] Furthermore, the court found that even the president himself did not obtain direct relations with that party, the essential link between the party and its law office prevented him to be a president to the case. The additional weight derives from the fact that he had chosen not to reveal such fact.[87]

In summary, this chapter has addressed the standard of independent and impartial arbitrators where the section addresses their characteristics, the contemporary system surrounding the

[80] "IBA Guidelines on Conflicts of Interest in International Arbitration" (2014).
[81] David D. Caron & Lee M. Caplan, *The UNCITRAL ARBITRATION RULES – a commentary*, 2nd edition, oxford, p. 196.
[82] Antonio Crivellaro, "Does the Arbitrators' Failure to Disclose Conflicts of Interest Fatally Lead to Annulment of the Award? The Approach of the European State Courts" 4 (n.d.): 22.
[83] Société Milan Presse v. Société Média Sud communication, Rev. arb. 1999.193 (Cour d'appel [CA] [regional court of appeal] Paris 1999).
[84] *Milan Presse v. Media Sud Communication*, Rev. arb. 1999.193.
[85] Ibid.
[86] Ibid.
[87] Anders Jilikén v. Ericsson, Hogsta Domstolen [HD] [Supreme Court] 2007-11- 19, Stockholm Int. Arb. Rev., 2007, 167.

standard of neutrality, and lists down the arbitrator's challenge procedure. The discussion also covers the topic of justifiable doubts, the *ex parte* communication's scope and limitation, and disclosure obligations. Following that, the next chapter will elaborate what social media is by defining the term and providing its scope, and indicate the current trends of social media usage by legal professionals. The content of the next section will also cover how social media networking affects the independence and impartiality of arbitrators, and the approaches on social media networking in international commercial arbitration.

Chapter III: The Impacts of Social Media Networking on the Independence and Impartiality of the Arbitrator and International Approaches

This chapter examines the definition, scope, impact and current trends of social media use, and the approaches taken by arbitral institutions. With regards to the examination on the point of view of major international rules and soft laws, this chapter will look at guidelines and rules of the IBA, the UNCITRAL, and the ICC. The guidelines and rules serve as an important tool that sets a standard for all arbitration actors and practitioners, as they are referred to frequently in arbitration. The chapter will also address opinions from the AAA as they point out issues with social media usage in arbitration and how to deal with the matter.

3.1 Definition and Scope of Social Media

Since chapter 1 has briefly introduced the definition of "social media," this section examines the term and its scope more thoroughly prior to an in depth discussion of how social media could have an impact on the perception of an arbitrator's independence and impartiality.

3.1.1 Definition

One of the most important elements that the 2014 IBA guidelines and many jurisdictions' laws lack is a precise definition of the term "social media." One source that defines social media is the IBA International Principles on Social Media Conduct ("IBA International Principles"). Based on the Principles, social media is "web-based and mobile technologies that turn text communication into active dialogue."[88] The label of the term may be misleading as activities in social media can

[88] *IBA International Principles on Social Media Conduct* ("IBA on Social Media Conduct"), (London: International Bar Association, 2014), 2.

infuse professional contexts and relationships according to the Principles. Consequently, social media is permeating and clouding the boundaries between "cyber space" and the "real world."[89]

However, the definition of social media under the IBA Principles is too vague and broad. Thus, this paper will examine other writings to improve the definition. To begin with, what social media provides is a platform or a service network, known as an SNS. An SNS is a service platform that allows members to make, manage, and share interests online. Social media websites empower interactions among consumers, such as the building of profiles and instant messaging, in order to enjoy interests such as family, dating, friendship, or hobbies. The number and size of SNS have exploded over the past decade.[90]

Certainly, in order to address issues related to social media and its impacts on arbitration, there should be a clear understanding of what it is and what limit should be available for arbitrators' usage of social media. In fact, there have been many authors weighing in to provide a definition to the term social media, and to suggest possible preventive actions on excessive social media usage.[91] According to the Guidance Note on Arbitration and Social Media issued by the Chartered Institute of Arbitrators New York ("CIArb NY"), social media is "virtual communities and electronic networks used by participants to create and share information."[92] The platform includes social networking sites such as Facebook, Twitter, and LinkedIn. According to Kaplan and Haenlin, from the perspective of social sciences, social media uses mobile and a group of Internet-based applications to establish interactive platforms for users.[93] Only three platforms such as LinkedIn, Facebook, and Twitter were under the 2013 panel discussion of IBA's Annual Meeting on social media relationships.[94] There are in fact many more internet-based applications for instance: Telegram, Flickr, Instagram, Line, Second Life, Snapchat, WeChat, Whatsapp, Wordpress, World of Warcraft, Yelp, and YouTube. The scope of social media considered by the IBA is thus too narrow.

3.1.2 Scope of Social Media

For the scope of social media which the 2014 IBA guidelines do not describe, Kaplan and

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[89] *IBA International Principles on Social Media Conduct* ("IBA on Social Media Conduct"), (London: International Bar Association, 2014), p. 2.
[90] Fundamentally Unfair: An Empirical Analysis Of Social Media Arbitration Clauses, Thomas H. Koenig & Michael L. Rustad, Case Western Reserve Law Review - Volume 65. Issue 2, 2014, p. 350.
[91] Ruth V. Glick and Laura J. Stipanowich, "Arbitrator Disclosure in the Internet Age." Dispute Resolution Journal 67, no. 1 (2012)
[92] "Guidance Note: Arbitration and Social Media," accessed August 9, 2017, https://ciarbny.org/wp-content/uploads/Social-Media-Guidance-Note-Final062015.pdf.
[93] Andreas M. Kaplan and Michael Haenlein, "Users of the World, Unite! The Challenges and Opportunities of Social Media," *Business Horizons* 53, no. 1 (January 2010), https://doi.org/10.1016/j.bushor.2009.09.003, p. 59, 61.
[94] Kyriaki Karadelis, "Boston: IBA Round-Up," *Global Arbitration Review*, GAR Article, October 15, 2013, https://globalarbitrationreview.com/article/1032835/boston-iba-round-up.

Haenlein divide social media into six categories: Collaborative projects, web logs (blogs), content communities, social network sites, virtual game worlds, and virtual social worlds.[95] According to Kaplan and Haenlein, people use social media to establish a public profile, to form a list of closely connected users, and to view the lists of own or others' users.[96] In addition, they provide an alternative definition to the term social media, as applications that allow creation and access of personal profile information and platforms users can use to deliver messages via email or instant messages.[97] Social media helps individuals to communicate with many people taking only a short period of time.[98]

Social networking sites are web-based services that enable people to "connect by creating personal information profiles, inviting friends and colleagues to have access to those profiles, and sending e-mails and instant messages between each other."[99] In truth, information available on social media is typically incomplete.[100] It is therefore quite challenging for attorneys to use sites such as Facebook or Twitter to investigate or do research on arbitrators and their social media usage.[101] Account owners on these platforms can apply privacy settings to label content as private. Other players can access the private data only when they send a friend request and subsequently receive an acceptance from another user.[102] Yet, the act of sending a friend request to a potential arbitrator could be implied as an inappropriate *ex parte* contact.[103] Other sorts of social media platforms involve and concentrate on more professional relationships. For instance, LinkedIn engages users from professional fields. This platform also renders more difficulty:[104] although some profiles are publicly accessible and do not necessitate approval from the LinkedIn member, the site might alert the user that another player has gone through his or her profile, and might even give the name of such individual.[105] Therefore, when people are doing an investigation into

[95] Suar Sanubari, "Arbitrator's Conduct on Social Media," *Journal of International Dispute Settlement*, January 10, 2017, idw026, https://doi.org/10.1093/jnlids/idw026, p. 488,489.
[96] Andreas M. Kaplan and Michael Haenlein, "Users of the World, Unite! The Challenges and Opportunities of Social Media," *Business Horizons* 53, no. 1 (January 2010): 59–68, https://doi.org/10.1016/j.bushor.2009.09.003, p. 63.
[97] Kaplan and Haenlein, p. 63.
[98] Bruno Gonçalves, Nicola Perra, and Alessandro Vespignani, "Modeling Users' Activity on Twitter Networks: Validation of Dunbar's Number," *Plos One* 6, no. 8 (August 3, 2011): e22656, https://doi.org/10.1371/journal.pone.0022656.
[99] Sanubari, "Arbitrator's Conduct on Social Media."
[100] "Accessible Social Media," University of Minnesota, Accessible U, accessed September 16, 2017, https://accessibility.umn.edu/tutorials/accessible-social-media.
[101] SMI Aware, "Is Social Media Evidence Admissible in Court?," *Social Media Information* (blog), June 4, 2015, https://smiaware.com/blog/is-social-media-evidence-admissible-in-court/.
[102] SMI Aware.
[103] Ibid.
[104] David Richards, Hays Specialist Recruitment (Holdings) Ltd. v. Ions, 745 [2008] EWHC (Ch) (High Court of Chancery 2008).
[105] James L Komie and James J McNamara, "Can Reviewing an Arbitrator's Social Media Presence Trigger an Impermissible Ex Parte Communication?," *Securities Arbitration Commentator* 2014, no. 4 (August 14, 1988): 3., 7.

another user's data, the user could be aware of it.

3.1.3 Current Trends of Social Media Usage

There are various reasons why a legal practitioner may pick up social media as a choice of communication.[106] A judge, for example, might wish to reconnect with their law school friends, colleagues, or even high school classmates. The judge might also want to increase interaction with distant family members and be in touch with previous coworkers.[107] In addition to other advantages, social media networking sites such as LinkedIn or Twitter can open doors for lawyers and other legal practitioners to new business opportunities. They are a perfect platform to gain contacts and exchange knowledge.[108] Therefore, it is natural that the number of social media users increases daily and rapidly, including legal practitioners.

3.2 How Social Media Affect the Independence and Impartiality of Arbitrators

Technology and arbitration interaction is not something that will happen in the future, it is happening now.[109] The international arbitration community has always concentrated on improving the efficiency and overall quality of arbitration, which includes the duration, cost, transparency and predictability of the institution. The fundamental issue and question are how technology can play a role in accomplishing these goals. In other words, how can technology have an impact on the success of an arbitration case?[110]

Arbitration practitioners can make effective use of technology. For instance, the usage of online and electronic tools such as emails and Dropbox can support an arbitration procedure. In the future, online hearings could also be common to assist far away parties or arbitral institutions.[111] However, there are drawbacks to having technology or social networking sites in arbitration or for legal practitioners. According to an international survey conducted by the IBA (the "IBA survey"), over 90 percent of respondents found that online social networking presents

[106] Celia Ampel, "Watch Your Mouth, Your Honor: Lessons for Judges on Social Media," Yahoo! Finance, accessed May 16, 2018, https://finance.yahoo.com/news/watch-mouth-honor-lessons-judges-063926807.html.
[107] John G Browning, "Why Can't We Be Friends? Judges' Use of Social Media," *University of Miami Law Review* 68 (February 11, 2014): 48, p. 513.
[108] "The Impact of Online Social Networking on the Legal Profession and Practice," p. 14.
[109] Maud Piers and Christian Aschauer, "Survey on the Present Use of ICT in International Arbitration," in *Arbitration in the Digital Age: The Brave New World of Arbitration* (Cambridge University Press, 2018), https://doi.org/10.1017/9781108283670, p. ix.
[110] Piers and Aschauer.
[111] Ibid.

a new set of challenges for the legal profession.[112] The concern is whether the relationship established by social media networking through the use of networking sites would impede the independence and impartiality of an arbitrator.

Arbitrators should be held to a standard similar to judges or other legal practitioners when it comes to social media usage. It is obvious that arbitrators should not be on social media, or blog with parties or counsels to have *ex parte* contacts in an on-going proceeding. They should as well not give any comments on undecided cases on those platforms. They have a duty to avoid speaking of anything that may cause doubt on their capacity to perform neutrally.[113] In addition, arbitrators should divide or manage their private online networking via platforms such as Facebook, from their professional ones on sites like LinkedIn. If a party to an on-going dispute (or its counsel) connected to an arbitrator through a professional networking platform, and the arbitrator was aware of the link, disclosure is necessary under a number of guidelines and rules. It applies when one who is aware of the circumstances could rationally think that the party (or its legal representative) could sway the arbitrator.[114]

3.3 Scholarly Opinions on Social Media Usage

With regards to the viewpoint from scholars on the usage of social media, many believe that there should be regulations on legal practitioners and arbitration users.[115] However, a practitioner needs to understand comprehensively and exactly how social media sites work in order to avoid any *ex parte* communications with arbitrators.[116]

3.4 International Approaches on Social Media Networking

3.4.1 The IBA on the Usage of Social Media

On October 23, 2014 the IBA approved Guidelines on Conflicts of Interest in International Arbitration. The purpose of the guidelines was to harmonize the standard of independence and

[112] An initiative of the Legal Projects Team, "The Impact of Online Social Networking on the Legal Profession and Practice."
[113] Ruth V. Glick and Laura J. Stipanowich, "Arbitrator Disclosure in the Internet Age: Some Guidance Concerning the Obligation to Disclose Internet Activity and Online Relationships," *Dispute Resolution Journal* 67, no. 1 (April 2012): 22–29; Lee, "Ex Parte Blogging"; Komie and McNamara, "Can Reviewing an Arbitrator's Social Media Presence Trigger an Impermissible Ex Parte Communication?;" Browning, "Why Can't We Be Friends? Judges' Use of Social Media."
[114] Glick and Stipanowich, "Arbitrator Disclosure in the Internet Age."
[115] Glick and Stipanowich.
[116] James L Komie and James J McNamara, "Can Reviewing an Arbitrator's Social Media Presence Trigger an Impermissible Ex Parte Communication?," n.d., 8.

impartiality in international arbitration, and they consist of two parts.[117] The first part deals with general standards stating the principles that should guide legal practitioners, parties and arbitral institutions when considering possible bias. The second part is composed of a list of specific situations, those contained in the red, orange and green lists, for practical guidance on disclosure duty concerning arbitrators' neutrality as mentioned in the first chapter.

Arbitrators are required to disclose all facts or circumstances that could lead to justifiable doubts as to their impartiality or independence.[118] In that respect, the 2014 IBA guidelines General Standard 2(C) provide that there is a justifiable doubt if the party to a dispute and a reasonable third person could view that the arbitrator is influenced or could neither be independent nor impartial. If an arbitrator believes that such doubts could exist, he or she should disclose them.[119]

Another reason to challenge an arbitrator under the 2014 IBA guidelines is when an arbitrator engages in an *ex parte* communication with a party to a dispute or its counsel. Concerning this matter, the IBA's Legal Practice Division Committee adopted the Guidelines on Party Representation in International Arbitration (the "Guidelines on PR") in 2013. The main purpose of these Guidelines is to deal with the great uncertainty of the standards of conduct applicable to counsel in the field of international arbitration.[120] Under the Guidelines on PR, e*x parte* communications are defined as oral or written communications between a party representative and an arbitrator or potential arbitrator without the attendance or awareness of the opposing party, and such contacts are not permissible.[121] The question here therefore is whether communication via social media, a virtual world, would count as non-written communication or the written communication based on the Guidelines on PR, and thus be prohibited.

On the topic of social media usage, currently the 2014 IBA guidelines note in its Green List that there is no requirement of disclosure if an arbitrator has a relationship with one of the parties or its affiliates via a social media network. IBA Principles, on the other hand, regulate how a person working in the legal profession should use social media in a responsible manner.

3.4.2 The UNCITRAL on Social Media Networking

The Model Law and the UNCITRAL Rules have the same standard for disclosure, as both of them require that the arbitrator disclose any situations that could establish justifiable doubts as to

[117] Introduction to the IBA Guidelines on Conflicts of Interest in International Arbitration, p. 3-4.
[118] *IBA Guidelines on Conflicts of Interest in International Arbitration* (International Bar Association, 2014), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.
[119] *IBA Guidelines on Conflicts of Interest in International Arbitration*, General Standard 2(C).
[120] Jean-Christophe Honlet, "The IBA Guidelines on Party Representation in International Arbitration," *Journal of International Arbitration* 30, no. 6 (2013121): 701–9.
[121] Tibor Varady et al., *International Commercial Arbitration: A Transnational Perspective*, 6th ed. (West Academic Publishing, 2015), p. 435.

the arbitrator's independence and impartiality.[122]

Regarding *ex parte* contacts, the UNCITRAL Rules, like many other arbitration rules, regulate the prohibition of *ex parte* communication between an adjudicator and a party or an attorney as stated in Art. 17(4) of the Rules.[123]

For social media regulation, UNCTIRAL has not yet commented on anything related to social media networking activities. However, online communication might be considered as a type of *ex parte* contact which requires the disclosure of the arbitrator.[124]

3.4.3 The ICC on Social Media Consideration

The current International Chamber of Commerce ("ICC") Arbitration Rules ("ICC Rules") was put into practice in 2017.[125] Based on the Rules, an ICC arbitrator must be independent of the party nominating him, and all arbitrators appointed or confirmed by the Court of Arbitration must remain independent of the parties involved in the arbitration.[126] ICC Rules stipulate that an arbitrator shall immediately disclose in writing any facts that could put his or her independence and impartiality into question. Disclosure could take place between the arbitrator's appointment or confirmation by the Court and the notification of the final award.[127] On the basis of *ex parte* communication, the ICC also prohibits arbitrators from being involved with a party or party representative during the arbitration process. The ICC has not paid attention to the regulation of social media nor has it focused on the number of arbitrators in the institution are using online social networking sites in their communications.[128]

3.4.4 The AAA Approach on the Ethics of Judges on Social Media Usage

The AAA is an eminent arbitral institutions.[129] In relation to how AAA's approach towards the standard of independent and impartial arbitrators, its arbitration rule R17 states that there should be disclosure provided that there are any circumstances that would lead to justifiable doubts towards an arbitrators' neutrality. The Article further calls for disclosure of any known

[122] Concise international arbitration, editor Loukas A. Mistelis, Wolters Kluwer, p. 609; UNCITRAL Model Law, Art. 12(1); UNCITRAL Rules, Art. 12(1).
[123] William W. Park, "A Fair Fight: Professional Guidelines in International Arbitration," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, October 7, 2014), https://papers.ssrn.com/abstract=2506639, p. 421.
[124] UNCITRAL Rules, Art. 17(4).
[125] "ICC - International Chamber of Commerce Arbitration Rules 1998 - (These Rules Came into Effect on 1 January 1998)," January 1, 1998, http://www.jus.uio.no/lm/icc.arbitration.rules.1998/.
[126] ICC Rules, Art. 11(2), 22(4).
[127] ICC Rules, Art. 11(2).
[128] "ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration" (ICC, March 1, 2017).
[129] Igor M Borba, "International Arbitration: A Comparative Study of the AAA and ICC Rules" (Marquette University, 2009), https://epublications.marquette.edu/theses_open/20/.

existing or past financial, business, professional or personal relationships which may judiciously affect their impartiality or independence in the eyes of any of the parties. Such an obligation is to be carried out throughout the whole arbitration process.[130]

In order to preserve the decision maker's neutrality, the legal profession has long warned lawyers not to communicate with judges *ex parte*.[131] The AAA Commercial Rules also discuss the topic of communication between the parties and a forthcoming arbitrator. Under R19 of the Rules, no party is allowed to communicate *ex parte* with an arbitrator or a potential arbitrator. There are, however, exceptions such as on the grounds of general advise, discussion regarding qualifications, availability, or suitability of candidates to serve as a third arbitrator where parties or party-designated arbitrators also take part in that process.[132] In the event that a party or counsel had any possible *ex parte* communication with the arbitrator, or had in any way discussed online aspects of the case or issues surrounding it, there should be a disclosure made in time.

There have been many cases related to judges' social media usage in US courts. Some rulings require that judges should not be "friends" with attorneys, while some comment that "friending" is allowable with limitations. As for arbitrators, the degree of a judge's relationship determines the scope of the disclosure.[133] In New York, the State Judicial Advisory Committee on Judicial Ethics reached a conclusion that judges are not prohibited from participating in social networking online or offline, but they need to use good judgment to manage what they do on those networks. Additionally, they are not allowed to use social media, electronic mailing lists, or blogs to conduct *ex parte* contacts with parties or counsel on pending cases.[134]

In summary, this chapter has examined what social media is and how it affects the neutrality of arbitrators in arbitration. In addition, I go further to observe institutional rules regarding the standard of arbitrators' independence and impartiality, and how arbitral institutions view the usage of social media. Although many institutions focus on setting a good standard for challenging an arbitrator, many of them miss the specific social media usage issue that is occurring in today's world. So far, only the IBA Guidelines and Principles mention the term and applicability of the usage of social media in arbitration. Another source trying to regulate social media networking is the AAA. These two institutions seem to have different approaches toward the use of social media. While the IBA has quite looser standard on arbitrators using social media networking sites, the AAA put a stricter threshold on the usage.

[130] AAA Commercial Rules, R17.
[131] Lee, "Ex Parte Blogging," p. 1554.
[132] AAA Commercial Arbitration Rules 2013, Art. R19.
[133] Glick and Stipanowich, "Arbitrator Disclosure in the Internet Age."
[134] Glick and Stipanowich.

Chapter IV: Analysis and Recommendations

Due to the development of modern communications, approaches concerning social media usage vary by jurisdictions.[135] Since Chapter II and Chapter III identified various methods that institutional arbitrations have adopted regarding standards of neutrality and concerns relating to social media, this chapter will analyze the tactics of arbitral institutions and courts by looking at cases and decisions. After reviewing relevant cases, this chapter will look at social media usage and its regulation in the context of Cambodia. With regards to the outcome of the analysis, this section will also recommend approaches in order to ensure that arbitrators preserve their reputation for being independent and impartial.

4.1 Case Studies on Misuses of Social Media

Arbitrations are venues where private disputes are resolved.[136] Everything, even information, in arbitration is kept confidential provided that there is no consent made by parties regarding any publicity.[137] A drawback to this secrecy is that there is not much information available regarding any misconduct and challenges to arbitrators during the course of their appointments.[138] Many scholars, and even the head of the National Commercial Arbitration Center ("NCAC") of Cambodia, have affirmed the opinion that if there is a challenge or conflict over the appointment of an arbitrator, the challenge is neither recorded nor published.[139] Rather, information comes and goes in silence. One reason could be that arbitration practitioners are a small community where everyone knows each other and that word could spread quickly.[140] Such practices could damage the reputation or the "business" of others working in the arbitration field. Therefore, it is reasonable that there are not many cases published in regards to the misuse or misconduct of

[135] Chapter II.
[136] Yasuaki Onuma, "International Dispute Resolution/Arbitration | International Practice | Practice Areas | OH-EBASHI LPC & PARTNERS," accessed May 5, 2018, http://www.ohebashi.com/en/practice/b11-4.php.
[137] Mayank Samuel, "Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?," Kluwer Arbitration Blog, February 21, 2017, http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/.
[138] Annalise Nelson, "The LCIA Arbitrator Challenge Digests: An Interview with William (Rusty) Park," *Kluwer Arbitration Blog* (blog), November 23, 2011, http://arbitrationblog.kluwerarbitration.com/2011/11/23/the-lcia-arbitrator-challenge-digests-an-interview-with-william-rusty-park/.
[139] Monin Ros, An Interview with the Head of NCAC, interview by Moniruoth Meng, February 25, 2018.
[140] Corporate Europe Observatory, "Chapter 4: Who Guards the Guardians? The Conflicting Interests of Investment Arbitrators," Corporate Europe Observatory, November 27, 2012, https://corporateeurope.org/pt/node/1269.

arbitrators on social media. However, there are cases in courts, and some in arbitration, regarding the challenge of arbitrators for their misuse of social media that this thesis can bring into the discussion.

This paper does not argue that there are no regulation on how arbitrators or judges should post, chat, or comment with their social media accounts. There are indeed guidelines and principles such as the IBA International Principles on Social Media Conduct established for all legal practitioners. This thesis, however, proposes that there can be a negative effect on arbitrators' independence and impartiality when an arbitrator not only is "friends" on Facebook or any other social media platforms but he or she also uses the SNS to communicate with counsel of a party to a dispute or the party itself. The chatting, commenting, or contact creates a "virtual" relationship between the arbitrator and the party that could lead to possible conflicts of interest. It could also lead to an *ex parte* communication among them. Cases at the national level, such as cases in US courts relating to judges' social media misuse and other cases stated below, demonstrate support for the position of this thesis.

4.1.1 *Chace v. Loisel, 2014* and *Domville v. State*, 2012

In the case of 2014 *Chace v. Loisel*, the issue in question was whether judges should be recused based on the grounds that they are Facebook friends with a lawyer.[141] In relation to that, the case of *Domville v. State* in 2012 was brought into the discussion.[142] Similar to *Chace v. Loisel*, the Florida District Court of Appeal in *Domville v. State* spoke of a Facebook matter concerning judges "friending" attorneys through a social media platform.[143] The court in the *Domville* case ruled that there is sufficient grounds to establish a well-founded fear of not obtaining a fair and impartial trial in a reasonably judicious person if a judge has a social networking "friendship" with the prosecutor of the underlying criminal case. In the case of *Chace*, the District Court of Appeal of Florida held that a judge "friending" a litigant while the case is pending can be grounds for recusal. According to the facts of the case, before the entry of final judgment, the trial judge in *Chace* reached out to the petitioner, *ex parte*, via a Facebook friend request. Following the counsel's advice, the petitioner did not respond to the request. The trial court thereafter decided on a dissolution of the marriage in *Chace*, attributed significant debt to the petitioner and provided the defendant of that case with an unreasonably excessive alimony award.[144]

Chace v. Loisel is an example of how strict U.S courts view connections through social media. The court in this case ruled that activities on SNS, for example becoming a friend on Facebook

[141] Sandra Chace v. Robert Loisel, 802 170 So. 3d (Fla: Dist. Court of Appeals, 5th Dist. 2014). Pierre Domville v. State of Florida, 184 103 So. 3d (Fla: Dist. Court of Appeals, 4th Dist. 2012).
[142] *Domville v. State*, 184 103 So. 3d.
[143] Ibid.
[144] *Chace v. Loisel*, 802 170 So. 3d.

with a party to an on-going proceeding, should not be permissible. Furthermore, such communication on SNS could be considered as *ex parte* contacts between the judge and a party, which is prohibited by law as it is outside the scope of a regular inquiry concerning the case or the administration of a case.

4.1.2 Juror on Facebook: *Attorney-General v. Fraill*, 2011

One renowned instance of social media misuse during a trial was the 2011 case of *Attorney-General v. Fraill*.[145] In 2011, London's High Court sentenced Joanne Fraill to eight months in prison. The basis of the decision was for contempt of court regarding the exchanges of Facebook messages by Fraill with the accused in a drug case while Fraill was serving on the jury. The communication included online discussion of the case while jury deliberations had not finished and verdicts had not been returned.[146] To be precise, in thirty-six-minutes, the defendant and Fraill exchanged over fifty Facebook instant messages about the trial, including sensitive information about jury discussions.[147] On top of that, Fraill also searched online for information about another defendant while she and other jurors were deliberating. All these activities contradicted clear instructions not to use the internet during the proceedings.[148]

This case shows an instance where even communication via online networking sites is not permissible regardless of the status of the person in the proceedings. The case also portrays strict requirements and standards for all, including jurors, who are to be involved in a proceeding. Thus, contacts in this particular matter are considered prohibited.

4.1.3 *Karlseng v. Cooke*, 2011

Besides the US and UK cases on social media use or social networking between a judge and a party or its attorney to a dispute, there are also cases in arbitration that discusses limitations on social networking between arbitrators and a party or counsel in arbitration. In *Karlseng v. Cooke* (2011), Karlseng engaged in a social relationship between an arbitrator and a counsel that was intimate enough to make the need for disclosure be clear. In this case, a panel of the Texas Court of Appeals annulled the arbitration award as the arbitrator did not successfully disclose his social relationship with one of the lawyers representing a party to the arbitration.[149]

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[145] "Attorney General v. Fraill and Another: Admn 16 Jun 2011," *Swarb.Co.Uk* (blog), March 12, 2017, http://swarb.co.uk/attorney-general-v-fraill-and-another-admn-16-jun-2011/.
[146] The Lord Chief Justice of England and Wales, Attorney General v. Fraill & Ors [2011] EWCH 1629 (Admin), WC2A 2LL EWCH 1629 [2011] (High Court of Justice Divsional Court 2011).
[147] "IBA - Online Social Networking Case Studies," International Bar Association, accessed May 6, 2018, https://www.ibanet.org/Committees/Divisions/Legal_Practice/Impact_of_OSN_on_LegalPractice/Impact_of_OSN_CaseStudies.aspx#jail_term.
[148] *Attorney-General v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21.
[149] Karlseng v. Cooke, 346 SW 3d 85, 2011, accessed May 6, 2018.

The opinion of the Court of Appeals panel focuses on what the court eventually considered as a social relationship between an arbitrator and an attorney in *Karlseng*. In accordance with the court, the relationship started in 1994, when the arbitrator was a U.S. magistrate judge and the counsel was a judge's clerk in the same building. The attorney ultimately moved into private practice. In 2003, after the judge retired, the two men were involved in a number of social interactions that occasionally involved substantial expenses.[150] Although such connections did not take place during arbitration, at least one such communication was scheduled to take place shortly before the arbitration and at least one occurred soon after the arbitration. In its decision, the court held that there exists a social relationship between the arbitrator and the attorney, and that the relationship might lead to impression of arbitrator's partiality. The court opined that the arbitrator should have made timely disclosure of such facts to all parties in the arbitration. In the court's observation, the social relationship was sufficient to create doubt regardless of the involvement of substantial business.[151]

This case depicts a standard for neutrality where social relationship intensity and *ex parte* interactions could lead to doubts regarding an arbitrator's partiality and consequently, to the annulment of an award. However, not all cases show that being a "friend" on Facebook or other social media platforms could lead to the disqualification or annulment of an award, the following two cases illustrate that there are situations where courts view the type of virtual status such as "friend" as neither being a serious misconduct nor grounds for a challenge.

4.1.4 *State v. Forguson*, 2014

In 2014 *State v. Forguson*, the defendant sought for a recusal from a judge who was a friend on Facebook with a witness. The Court of Criminal Appeals of Tennessee held that the proof of the claim was insufficient to show that the court could be biased.[152]

The grounds for the defendant's failure were that there are some loopholes to their arguments. In this instance, the defendant only challenged the court based on the assertion that there is an appearance of bias since the trial judge is a Facebook friend with a witness. The defendant did not prove that the participation of the trial judge in social networking sites such as Facebook could actually prohibit him from appropriately acting in his role.[153] This case thus did not address the

[150] Gregg M. Formella, "Attorney's Undisclosed Social Contacts with Arbitrator Cause Texas Court to Vacate Award," American Bar Association - Section of Labor and Employment, accessed May 6, 2018, https://www.americanbar.org/newsletter/groups/labor_law/adr_newsletter/1109_issue/1109_formella.html.
[151] Formella.
[152] State of Tennessee v. Jeffrey M. Forguson, No. No. M2013-00257-CCA-R3-CD (Court of Criminal Appeals of Tennessee February 18, 2014).
[153] "State of Tennessee v. Jeffrey M. Forguson," CourtListener, accessed May 6, 2018, https://www.courtlistener.com/opinion/2653628/state-of-tennessee-v-jeffrey-m-forguson/.

length of the Facebook relationship between the trial court and the witness, the extent of their interaction through the internet, nor the nature of the interactions themselves.[154]

In this regard, a judge at the court of appeal addressed the matter more thoroughly in his concurring decision.[155] He stated that there could be grounds for disqualification when a judge has a Facebook relationship with a litigant or a litigant's key witness, provided that the following events occur. When a judge shares a Facebook friendship with an individual, the aggrieved party should show that such a social media relationship is more active, regular, or intimate than the mere incidental community propinquity may have. For example, the defendant should state how intentional the relationship is, who initiated it and the time it was commenced, and the way the participants use the medium. Questions should also surround what type of information is shared, and what the regularity of the communication is.[156]

This case, read together with the concurring decision, says that social media could indeed establish relationships that lead to concerns that a judge could make a biased decision. In other words, the challenged judge could have been disqualified in the case had the defendant been able to fully prove the intensity of the relationship between the judge and the witness demonstrated through the usage of social media networking site.

4.1.5 *Law Offices of Herssein and Herssein, P.A. v. United Services Automobile Association*, 2017

The Third District Court of Appeals for the State of Florida, in 2017 *Law Offices of Herssein and Herssein, P.A. v. United Services Automobile Association*, was to decide whether a presiding judge should withdraw from the case since he was friends on Facebook with a legal representative of the case. In this case, the court held that there should not be a recusal.[157] Along with its verdict, the court in *Herssein* cited a former court's judgment in that "[a] Facebook friendship does not necessarily signify the existence of a close relationship."[158] The court determined the outcome of the case based upon three grounds.

First, the court raised the situations from Kentucky and Tennessee cases which discuss the number of Facebook friends one user could have. The court affirmed that some users obtain thousands of Facebook friends (some even had more than 4,900 friends).[159] Second, the court

[154] *State v. Forguson*.
[155] State of Tennessee v. Jeffrey M. Forguson, 734 Leagle (Court of Criminal Appeals of Tennessee 2014).
[156] *State v. Forguson*.
[157] Law Offices of Herssein and Herssein, Pa v. United Services Automobile Association, No. Case No. 3D17-1421 (Dist. Court of Appeals, 3rd Dist. August 23, 2017).
[158] Stephen B. Stern and Amitis Darabnia, "When Is a Facebook Friend a 'Friend' Versus an 'Acquaintance'?," accessed May 5, 2018, https://www.hwlaw.com/resources/blog/2017/september/when-is-a-facebook-friend-a-friend-versus-an-acq.aspx.
[159] Sluss v. Com., 381 S.W. 3d 215 (Supreme Court of Kentucky 2012).

opined that Facebook users usually could not remember every individual they sent friend request to or they received friend request from.[160] Third, the court learned that many Facebook friends are chosen in accordance with Facebook's data-mining technology, contrary to the basis of actual private relations.[161] Relatively, the court found that Facebook data-mines a user's friends' list, and other available public and private information, then analyzes to estimate links, and suggests to the member "people you may know" as possible friends. The court recognized that these data-mining activities are transforming the market and state security systems, and they could be an influential means to construct private and professional links. However, there is no close-knit friendship that would justify recusal.[162]

` Since being a friend online is certainly not a real friend in the customary sense, the court concluded that just because a judge is friend on Facebook with a lawyer or a witness, without more evidence, there cannot be justifiable fear that the judge is biased or that the judge is influenced by the Facebook friend.[163] In addition, the mere link between a lawyer, a party, or a witness and a judge chairing a case does not alone merit recusal, but it does possibly raise doubts as to the nature of the relationship.

Both the *Forguson* and the *Herssein* case offer a broader picture of how courts address the issue of having a "friend" status on social networking sites between a decision maker and a party or its legal representative. The two cases show that mere friendship such as being a friend on Facebook or on any other online platform does not automatically constitute an intimate friendship that would result in recusal from an arbitrator or a judge, or in an annulment of an award. On the other hand, it requires activities beyond the status of friend on the social media platform. Regardless, courts should look more closely into and attorneys should prove the nature of the relationship of the party or its attorney with the judge or the adjudicator to the case when dealing with issues regarding virtual friendships.

4.2 Solutions to The Possible Future Conflicts of Interest Arising out of Social Media Usage

Arbitrators are normal people; they are also businesspeople in the sense that they need to

[160] Stern and Darabnia, "When Is a Facebook Friend a 'Friend' Versus an 'Acquaintance'?"
[161] Hyatt, Weber PA-Stephen B. Stern, and Amitis Darabnia, "When Is a Facebook Friend a 'Friend' Versus an 'Acquaintance'?," Lexology, accessed May 6, 2018, https://www.lexology.com/library/detail.aspx?g=72060f02-0696-4c30-a72d-0a299e482fa5.
[162] Law Offices of Herssein and Herssein, Pa v. United Services Automobile Association.
[163] Law Offices of Herssein and Herssein, Pa v. United Services Automobile Association.

advertise and network to become better-known and acquire cases.[164] In one way of doing this, some arbitrators use Facebook or other social media platforms as a method of interaction and communication with others, including counsels.[165] Such contact via online networking could be detrimental as they could make parties doubtful of arbitrators' neutrality. There are in fact four ways that legal practitioners could use social media improperly: getting in touch with parties, witnesses, lawyers or others during the proceedings; sharing information about the case; conversing about the case or pursuing opinions from outsiders not related to the case; and/or finding information about the matter from a source outside of the court or arbitration.[166]

As illustrated in previous chapters and can be observed by the cases in this chapter, social media usage by legal practitioners in arbitration does hold a possibility of creating conflicts of interest and consequently leading to negative impacts on arbitrators' neutrality. Although there are differing opinions, this paper finds that even the IBA and AAA uphold different views towards the usage of social media. Thus, this thesis proposes that arbitrations should focus on the nature of the relationship, the disclosure standard, and the limit on *ex parte* communications by the parties. The last part of this section examines and presents a number of recommendations that best fits Cambodian context. Lastly, the final section provides a summation of the recommendations suggested for the international commercial arbitration seated in the Kingdom of Cambodia.

4.2.1 Cambodian Legislation on Social Media Usage

Prior to an in-depth investigation into Cambodian arbitration law on social media use and standard of arbitrators' neutrality, considerations should be placed first on the current trends and usage of social media in the country.

a. Current Social Media Use in Cambodia

As of 2018, there are over 16 million people living in Cambodia.[167] However, in the Kingdom, there are around 27.16 million mobile connections, 7.16 million internet users, 4.9 million active social media users, and 4.4 million active social mobile users. The social media networking site Facebook has proven itself as the chosen platform for social media users in the country by having the network boasting 4.8 million registered users, and 2.9 million daily active users in 2017.[168]

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[164] Dezalay, Y. & Garth, B.G., Dealing in Virtue: International Commercial Arbitration and the Construction of a Trans-national Legal Order (University of Chicago, 1996), p. 50.
[165] NYSBA Blogging Policy, "Arbitrators/Mediators Using Social Media (Resolution Roundtable)," Resolution Roundtable, January 5, 2016, http://nysbar.com/blogs/ResolutionRoundtable/2016/01/arbitrators_using_social_media.html.
[166] Dunning, "Dunning, Rachel --- '#Juryduty - Jurors Using Social Media.'"
[167] "Cambodia Population (2018) - Worldometers," Worldometers, accessed April 23, 2018, http://www.worldometers.info/world-population/cambodia-population/.
[168] Endorphine Concept Digital Solutions for Geeks in Cambodia, "The Development of Cambodia's Social Media and Digital Scene," Endorphine Concept Digital Solutions, accessed April 23, 2018,

Concerning the current use of social networking sites in Cambodian arbitration, according to an interview with the head of the NCAC in Cambodia on February 25, 2018, all arbitrators and staff working at the center own at least one mobile phone or a smart phone. Communication within the institution relies mostly on social media platforms such as Telegram, Whatsapp, and Facebook's messenger.[169]

b. Cambodian Regulation on Social Media Use and Standards of Neutrality

According to the head of NCAC, there have been nine total arbitration cases in the center now, and Cambodian legal practitioners are working on improving the arbitration system within the state in order to attract more cases. The Cambodian Law on Commercial Arbitration is a verbatim adoption of the UNCITRAL Model Law. On the basis of obtaining independent and impartial arbitrators, the Cambodian Law on Commercial Arbitration requires that arbitrators, upon appointment, disclose all circumstances that are likely to raise doubts to his or her neutrality.[170] In addition, the NCAC also has red, orange, and green lists similar to that of the 2014 IBA guidelines, which are under the NCAC Arbitrator Code of Conduct and its annex.[171] However, unlike the IBA guidelines, the annex under the NCAC Code of Conduct does not mention social media relationships, not even in the green list.[172]

Cambodian institutional arbitration is in the process of making the state arbitration better. With that, this paper suggests that Cambodian arbitration should keep up with recent developments in international commercial arbitration, such as the increasing number of social networking users, and follow other well regarded international institutions such as the IBA.

4.3 Revision to the IBA Guidelines on Conflicts of Interest

As the 2014 IBA guidelines is the legal document that is most commonly referenced when dealing with issues of disclosure and the neutrality standard, the author recommends that action addressing the use of social media should start from the IBA.

As the cases of *Herseein* in 2017 and *Forguson* in 2014 suggest, there should be an investigation into the nature of the relationship established through social media networking between users in court, or in this instance in arbitration. The duty of investigating does not only include the parties to a dispute but also the arbitrator himself or herself. Counsels can also use the

http://endorphine-concept.com/what-s-new/the-development-of-cambodias-social-media-and-digital-scene.

[169] Ros, An Interview with the Head of NCAC.

[170] Cambodian Law on Commercial Arbitration, Art. 20.

[171] NCAC Arbitrator Code of Conduct.

[172] Ibid.

opportunity to strengthen their argument by being able to fully prove possible conflicts of interest in showing the intensity and nature of a relationship, legal practitioners have in using social media as a networking strategy.

With regards to standards of disclosure, institutional rules including the 2014 IBA guidelines all advise that in case of questions of whether or not to disclose, the better approach is to disclose. One of the reasons for disclosure is that there could be trouble concerning the invasion of privacy, unauthorized access, or incomplete data. Therefore, it is a difficult task for a party to do data-mining to unravel or dig out any relationship between an arbitrator and a counsel, or its party to a dispute. With the disclosure of any social media relationships, parties can know better whether their arbitrator did establish any kind of relationship with a member from the other party.

The limits of *ex parte* communication suggested by many institutions and in the IBA Guidelines on Party Representative should also be revised to prohibit any further interactions through the virtual world among arbitrators, counsel, party or witnesses to a dispute in arbitration.[173] The "oral and written communication" under the Guidelines on PR should cover the use of social networking sites to write or communicate among actors in arbitration prior to or during the arbitral proceeding.

With regards to further recommendations, this thesis proposes that the 2014 IBA guidelines should be revised and that the IBA should consider the nuance of social media relationships.[174] The current generalist approach of sections 4.3.1 and 4.4.4 of the 2014 IBA guidelines is insufficient to address current technological advancements. Recent cases such as the 2014 *Tesco* case, 2014 *Forguson* case, and 2017 *Herssein* case, all advise that there should be an awareness of how intense the relationship in social media between the legal practitioners and the party or lawyers is. To put it simply, there should be a disclosure of how intentional a relationship is, the length of the relationship, and the way all parties and legal professionals use the platforms. This can be done by classifying social media into professional and personal networks. The professional social network should be listed in the "Green List" because the risks of justifiable doubts on arbitrators' neutrality is too distant.[175] However, the general social networks through social media should be listed in the "Orange List" for the fear regarding the risk of close personal or private relationships.

As mentioned in chapter 3, based on a survey on the impact of online social networking conducted by the IBA team in 2012, over 90 percent of survey takers believed that online social networking brings about a new set of challenges for the legal profession. Over 90 percent of them also felt that it is unacceptable for lawyers and judges to post comments or opinions about fellow

[173] Honlet, "The IBA Guidelines on Party Representation in International Arbitration."
[174] Sanubari, "Arbitrator's Conduct on Social Media."
[175] Sanubari.

lawyers, judges, parties, or cases in progress on social media networking sites.[176] However, after the 2012 survey, the IBA still listed social media relationships under the green list in its 2014 guidelines. The reason was that the issue of online social networking within the legal profession has not reached the same scale in all states, so regulations on social media was not required at that time. However, the IBA committee also mentioned that it is needed "not at the moment, but maybe in the future."[177]

The author believes that the future is now. In 2012, there were only 1.4 billion social networking users compared to 2.62 billion in 2018. The number is expected to rise up to 3.02 billion in 2021, three times as much as 2012.[178] Therefore, this research proposes that it is now feasible and it is the right time for the IBA to revise the list under its Guidelines and put social media relationship in the orange list, helping to avoid future possible conflicts of interest between arbitration users.

Chapter V: Conclusion

To have a "friend in court" used to mean you were close to the king, or had some relations that could affect the throne.[179] To this day, the word friend also comes up when people discuss social media platforms, such as friends on Facebook or LinkedIn. Although it might be true that only being a friend on social media such as Facebook could mean nothing but a normal status, this thesis looks at the intensity and usage of the platforms and the relationships established through it.

5.1 The Independence and Impartiality of Arbitrators

Chapter II examined the standard of independent and impartial arbitrators. Specifically, the core components of integrity are independence and impartiality.[180] As mentioned in this paper, all arbitrators are required to be independent and impartial in dealing with cases. The standard of justifiable doubts, the *ex parte* communication's scope and limitation, and disclosure obligations were also under the discussions in this section. Then, the paper looked at the main issue which is

[176] An initiative of the Legal Projects Team, "The Impact of Online Social Networking on the Legal Profession and Practice."
[177] Ibid.
[178] "Number of Worldwide Social Network Users 2010-2021."
[179]Bill Cotterell, "Judge as 'Facebook Friend' Goes to Court," News-Press, accessed May 23, 2018, https://www.news-press.com/story/opinion/columnists/2017/10/20/judge-facebook-friend-goes-court/782164001/.
[180] Jan Paulsson, The Idea of Arbitration, Chapter 5: Ethical Challenges, p. 149.

how social media networking has an impact on the neutrality of the arbitrator.

5.2 The Impact of Social Media Networking on the Independence and Impartiality of the Arbitrator and International Approaches

The third chapter scrutinized the definition and scope of social media is and how it may affect the independence and impartiality of arbitrators. A neutrality standard can be found in many renowned institutions internationally and nationally such as the 2014 IBA guidelines, the UNCITRAL Model Law and Rules, the ICC Rules, and the AAA Rules. With the standard of justifiable doubts for the disclosure and challenge of arbitrators, this paper observed that in cases of confusion, there is a preference to disclose any relationship that an arbitrator has with a counsel, a party, or a witness to a dispute. This section offers a clear picture that there are different thresholds towards the usage of social media in the IBA and the AAA, as the AAA seems to be adopting a stricter standard on the social networking online between an umpire and a party or its attorney. One of the reasons for the stricter requirement is that there have been many cases in the US regarding the misuse of social media in court by judges and/or witnesses. In the AAA, arbitrators and counsels are not advised to engage in any online relationship with one another, if it is possible.

5.3 Analysis and Recommendations

The question of the impacts of social media on the independence and impartiality of arbitrators is currently very controversial within in the field of commercial arbitration. Online relationships are one sort of relationship. What is important is the substance of the relationship. The issue thus surrounds whether the relationship established through online networking between users could lead to a justifiable doubt to the neutrality of arbitrators.[181] In other words, it is the existence of close personal relationships between users that is the problem.

Chapter four has also looked at cases in the US and UK, and in arbitration. In the cases of *Chace, Domville, Attorney-General v. Fraill,* and *Karlseng v. Cooke*, the courts found that online activities and social relationships between a judge or an arbitrator and a party or a counsel to a dispute should not be permissible, especially during the course of a proceeding. The consequences

[181] Sanubari, "Arbitrator's Conduct on Social Media."

of the relationship established out of social and online networking could result in disqualification or the annulment of an award. A more serious outcome is in the example of *Fraill* with a jury member using Facebook. Fraill was sentenced to eight months in prison for the misuse of social media.

Nevertheless, cases such as *State v. Forguson* and *Herssein* indicate that a mere Facebook friend status does not amount to an automatic disqualification or the invalidation of an award. The court in both cases advised parties to prove the nature of the relationship of the arbitrator or judge and another party or its counsel, including the intensity and intentionality of the relationship, the person who initiated it, and the time the relationship began.

Upon the examination of cases and institutional rules, this thesis offers three recommendations: to look at the nature of the relationship established out of social media, to revise the disclosure standard under the 2014 IBA guidelines, and to put a limit on *ex parte* communications by the parties. With regards to the first suggestion, the thesis requests that arbitral institutions scrutinize the intensity and the nature of relationships created through the usage of social media networking sites.

This paper also recommends a revision of the disclosure standard of the 2014 IBA guidelines sections 4.3.1 and 4.4.4 as the current one is deficient in tackling the development of technology and social media. The recommendations include the classification of professional and personal networks via the use of social media platforms and the moving of social media for personal usage to the "Orange List" under the 2014 IBA guidelines.

Concerning the third suggestion, this paper proposes that there should be a limit on the use of social media for *ex parte* communication. Prohibited "oral" and "written" communication under many institutions and rules such as the IBA's Guidelines on Party Representation should also include the use of social media networking sites to communicate or write to arbitrators, counsels, or parties in arbitration prior to or during the arbitral proceeding.

The author believes that a critical examination of arbitrators' conduct on social media requires a broad understanding and knowledge of social media by legal practitioners, especially arbitrators. Arbitrators' conduct on social media is in fact an emerging subject in arbitration that legal professionals should focus their attention on. Thus, Cambodian NCAC should also catch up to the modernized world and follow the footsteps of the IBA which is one of the leading institutions on regulating conflicts of interests in conducting legal profession.

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